United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -

JUNE TERM

Docket No. 75-4002

- -

CLAUDIO PEDRO BENAVIDES-PAREDES,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

- -

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

PETITIONER'S BRIEF

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UNITED STATES COURT OF APPEALS
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JUNE TERM 1975

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CLAUDIO PEDRO BENAVIDES-PAREDES,

Petitioner,

-v-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

- -

PETITIONER'S BRIEF

Statement of the Issues

1. Whether the Department of State and/or the Immigration & Naturalization Service was arbitrary and capricious in denying appellant's application to withhold deportation because he would be subject to persecution in Chile on account of his political opinions.

2. Whether the Department of State was a disinterested party in recommending to the Immigration & Naturalization Service that the petitioner would not be subjected to political persecution because the Department of State itself had actively aided, through its agents, servants and/or employees and the C.I.A. in subverting the lawfully-elected government of Chile under Allende.

3. Whether the Immigration & Naturalization Service was arbitrary and capricious in denying voluntary departure to petitioner.

Statement of the Case

Pursuant to Section 106(a) of the Immigration & Nationality Act, 8 U.S.C. Sec. 1105(a), petitioner petitions this Court for review of a final order of deportation entered against him by the Board of Immigration Appeals on December 16, 1974. That order dismissed an appeal from an order of a Special Inquiry Officer finding him deportable and denying him voluntary departure and further denying him relief under Sec. 243(h) of the Immigration & Nationality Act, to wit, that his life or freedom would be threatened in Chile on account of his political opinions.

Statement of the Facts

Petitioner is a 28-year-old single male alien, a native and citizen of Chile who entered the United States on January 15, 1970 as a stowaway and remained in the United States since that time to the present. The allegations and the charge of deportability in the order to show cause were conceded at the deportation hearing held May 30, 1974. At the hearing petitioner requested withholding of deportation under Sec. 243(h) of the Immigration & Nationality Act, claiming political persecution if forced to return to Chile, the country designated and the country of deportation. Alternatively he requested voluntary departure.

The Immigration Judge found the alien deportable, denied the applications for voluntary departure and for the withholding of deportation under Sec. 243(h) of the Immigration & Nationality Act, and ordered the petitioner deported to Chile. Petitioner appealed from that decision to the Board of Immigration Appeals on December 16, 1974 and the Board dismissed the appeal. Petitioner filed his petition for review of the Board's order.

ARGUMENT : I

THE DEPARTMENT OF STATE AND/OR THE IMMIGRATION & NATURALIZATION SERVICE WAS ARBITRARY AND CAPRICIOUS IN DENYING PETITIONER'S APPLICATION TO WITHHOLD DEPORTATION BECAUSE HE WOULD BE SUBJECT TO PERSECUTION IN CHILE ON ACCOUNT OF HIS POLITICAL OPINIONS.

In 1950 the Attorney General was mandated not to deport an alien to a country where the alien would be subjected to physical persecution. Sec. 20(a), Act of February 5, 1917, 39 Stat. 890, as amended by Sec. 23, Internal Security Act of 1950, 64 Stat. 987. In 1965 the concept of persecution was expanded beyond bodily violence to include persecution on "account of race, religion, or political opinion". Sec. 243(h),Act of 1952, as amended, 8 U.S.C. 1253(h).

The Attorney General is charged with the discretionary authority to determine the issue of withholding deportation when in his opinion an alien would be subject to persecution. Namkung v. Boyd, 226 F. 2d. 385 (9th Cir. 1955).

The burden of proof rests on the alien that he would be persecuted if he returns to his country. 8 C.F.R. 242.17(d) Of facts or conditions which are matters of common knowledge the hearing officer may take judicial notice. Lavdas v. Holland, 235 F. 2d. 955 (3rd Cir. 1956).

At the deportation hearing the petitioner testified concerning the political repression which exists in Chile today. From his friends who have recently come from Chile he knows that freedom does not exist there. There have been executions; many people have been exiled and there are

serious economic problems. He has read the newspapers which are of course available to all and in which there appear daily reports of oppression in Chile. He fears to return because he would not be able to speak out against the government.

There is no definition of persecution in the statute. It is clear that it means "anticipated" persecution because the statute speaks of persecution based on political opinion. An opinion in Webster's Seventh New Collegiate Dictionary is defined as a view, judgment, or appraisal formed in the mind about a particular matter. The petitioner amply testified to his opinion which he holds to be true. If as he claimed, he would express his view that he opposes the government in Chile, what other reasonable conclusion may be made than that he would be persecuted for his opinions?

The Immigration Judge and the Board of Immigration Appeals were following a standard that is contrary to the terms of the statute. They held that if a country as Chile restricts freedom of speech, then this alien is in no different position from any other countryman who expresses his political opinion and would as a result suffer persecution. The Board of Immigration Appeals holds that unless this alien was specially singled out, he may not claim political persecution. Fu v. INS, 386 F.2d. 750 (2nd Cir. 1967), cert. den. 390 U.S. 1003 (1968). This is contrary to the statute because the statute does not say by its terms that only aliens singled out by the government can claim they would be persecuted.

his decision on an evaluation of the alien's evidence, and on the advice received from the Department of State. In the case at bar no evidence was presented except the alien's testimony and a communication from the State Department denying the petitioner's request for asylum.

It is respectfully submitted that the Department of State was not a disinterested party capable of making an objective determination of this issue. In countless articles in the press: The New York Times, The Washington Post, Time Magazine, The Latin America Press, The New York Post, The Guardian, The Miami Herald, to mention but a few, there have appeared reports that the Department of State and the C.I.A. had direct roles in overthrowing the lawfully elected government of Allende and propping up the military government which succeeded him.

The government of Chile has been charged with extremely serious violations of human rights including extensive torture of political prisoners by the Organization of American States. The New York Times, Dec. 10, 1974. And torture continues to be a way of life in Chile, as reported in The New York Times of May 25, 1975.

These disclosures that the State Department actively participated in the economic and political undermining of Allende's government in Chile, a democratically elected government, reveal the hypocrisy of the State Department's position that it played no part in the violent ending of this constitutional regime in Chile. The State Department's advice to the Immigration Judge that the alien herein would not be persecuted

It refers to one who may be persecuted for his political opinion even if he is one of a large group provided he is likely to be persecuted for his political opinion.

The Immigration Judge and the Board relying on a standard of proof impossible to fulfill, and requiring proof that the alien would be singled out for persecution, rather than the statutory requirement that he prove "anticipated" persecution, did not give the statements of the petitioner the most careful evaluation in light of the limited evidence available to the applicant. Matter of Sihasale, 11 IN 531 (1966).

II.

THE DEPARTMENT OF STATE WAS NOT A DISINTERESTED PARTY IN RECOMMENDING TO THE IMMIGRATION & NATURALIZATION SERVICE THAT THE PETITIONER WOULD NOT BE SUBJECTED TO POLITICAL PERSECUTION BECAUSE THE DEPARTMENT OF STATE ITSELF HAD ACTIVELY AIDED, THROUGH ITS AGENTS, SERVANTS AND/OR EMPLOYEES XXXX THE C.I.A. IN SUBVERTING THE LAWFULLY-ELECTED GOVERNMENT OF CHILE UNDER ALLENDE.

Until January 22, 1962 applications respecting political persecution could only be made after a final finding of deportability. 8 C.F.R. (1952 Ed.), 243.3(b). Since then, a persecution claim is considered by the Immigration Judge during the course of the deportation hearing and is determined by him in the final deportation order and his decision is appealable to the Board of Immigration Appeals. 8 C.F.R. 242.17(c), as amended by 26 FR 12112 (Dec. 19, 1961).

Since 1963 the custom has been that respecting a claim of persecution, the Immigration Judge requests an expression from the Department of State concerning the likelihood of persecution. The Judge must make

was in line with its official position that it had nothing to do with the overthrow of Allende. It continues to maintain this fiction as well as the one that the government of Chile does not persecute or torture its opponents.

By its actions the State Department has shown itself not to be worthy of belief and made in its own self interest without any concern about the "anticipated" persecution of this alien. The Immigration Judge relied on no other data adverse to this alien except this opinion of the State Department.

When a department of the government is derelict in its duty, violates the law, and does not render its opinion or decisions as it is charged by law to do in good faith, then it is respectfully submitted the Judiciary has an obligation to act, to make a determination in the place of the derelict department of the government, and to impose its judgment in place of the Department of State which has forfeited the right to make a decision or recommendation in this case.

III.

THE IMMIGRATION JUDGE WAS ARBITRARY AND CAPRICIOUS IN DENYING VOLUNTARY DEPARTURE TO PETITIONER.

The Immigration Judge did not properly give sufficient weight to the general criteria which guide the issue of whether an alien should receive voluntary departure or not.

The alien established he had not previously violated the immigration law other than his one entry as a stowaway; he established his

ability to depart at his own expense; he had not previously been permitted voluntary departure and thereafter reentered voluntarily. The Judge did not take into account the alien's youth or his good character.

It appears he decided entirely on the issue of his having entered as a stowaway. Although voluntary departure has often been denied to stowaways (Matter of P, 5 IN 306 (1953), it has been held recently by the Board of Immigration Appeals that this denial be made in the absence of other appealing factors. Matter of Pimentel, 12 IN 50 (1967). Thus in the Pimental case, besides being a stowaway, the alien lied when apprehended. In the case at bar the only adverse factor against the alien was that he was a stowaway and there were strong equities on his side which the Judge should have based a discretionary grant of voluntary departure.

CONCLUSION

The decision of the Board of Immigration Appeals should be reversed and the deportation proceedings dismissed and terminated.

Respectfully Submitted,

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Paul J.

COPY RECEIVED
June 9,

UNITED STATES ATTO

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